

# PERSPECTIVES

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## **The Status of Islamic Law in the Modern Commercial World\*\***

One of the most important political and cultural developments of the last ten years has been the resurgence of interest by Islamic countries in their religion. This development, popularly referred to in the West as "Islamic fundamentalism," has as one of its most prominent features an increasing emphasis on Islamic law. In some countries, such as Saudi Arabia, Islamic law has always been the basis of the legal system. In others, Islamic law is supplanting Western law as the basis of the legal system. In still other Islamic countries, popular enthusiasm for Islamic law exists, but has not yet effected any change in the legal systems, most of which are derived from European legal systems. The question therefore arises as to the effect this increased emphasis on Islamic law will have on business transactions in Islamic countries. The relevance of this inquiry is made apparent by the large number of banks in Saudi Arabia that did not take heed of Islamic law in making loans five years ago and now are paying the price of being unable to collect the interest to which their loan agreements otherwise entitle them.

Part one of this article provides a brief overview of how courts applying Islamic law would view legal issues arising out of a commercial transaction differently than a Western court would. The principal conclusion of Part one is that Islamic law is much more restrictive of the parties' freedom to contract than is Western law. Part two explores the extent to which the restrictions of Islamic law are actually applied by courts in Islamic countries to commercial transactions. The conclusion of Part two is that courts usually do not apply Islamic law, but considerable uncertainty exists at the moment in a number of countries as to when a court will

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invoke its principles. This uncertainty reduces businessmen's confidence that the court systems of Islamic countries will give effect to contracts they freely enter.

In contrast to Western legal systems, Islamic legal texts concentrate more on family law, inheritance law, and criminal law than on matters pertaining to commerce. The discussion of commercial law in this article, therefore, is not a representative sampling of Islamic law generally. The scope of the article is even further limited in that it focuses on the major differences between Islamic law and Western law as they would affect commercial transactions. Similarities or nonsignificant differences are many, and are not treated here.

## I. The Shari'a View of Commerce

### A. BACKGROUND

Shari'a is the term given to the Islamic legal system. Shari'a is derived from the following sources, in order of priority: first, the Koran; second, the Sunnah or decisions and sayings of the Prophet Muhammad; third, analogical reasoning by Islamic scholars from principles established in the Koran and Sunnah; and fourth, the consensus of the legal community. By the tenth century A.D. respect for the early scholars was so strong that the legal community decided that further improvement of their analysis of divine law was not possible. This event, known as "the closing of the door of '*ijtihad*' (independent reasoning)," froze the evolution of Islamic law at that point.<sup>1</sup> Shari'a judges and scholars are, therefore, limited to applying the law as set by the early writers and cannot change, modify, or extend that law.<sup>2</sup> The result is a legal system that has never had the opportunity to accommodate itself to the modern business world. It is for this reason that a number of important figures in the Islamic world (including Saudi Arabia's King Fahad) have advocated reopening the door of *ijtihad*. Shari'a is, as it has been from the beginning, a system that is more concerned with moral conduct than in facilitating commerce. As one scholar has observed, Shari'a believes that "[l]iberty of contract would be incompatible with the ethical control of legal transactions."<sup>3</sup>

### B. THE CONCEPT OF *RIBA*

Most businessmen involved with the Middle East are aware that Shari'a law prohibits interest on loans. This, however, is just one application of

1. N. COULSON, *COMMERCIAL LAW IN THE GULF STATES* 17 (1979).

2. *Id.* One Pakistani Shari'a scholar has observed that Shari'a judges may not vary the interpretations of the ancient scholars or use analogical reasoning. A. AHMAD, *ISLAMIC LAW IN THEORY AND PRACTICE* 95-96 (1956).

3. J. SCHACT, *AN INTRODUCTION TO ISLAMIC LAW* 144 (1964).

the broader concept of "*riba*." Although a precise and universally accepted definition is elusive, *riba* basically means unearned or unjustified profit. *Riba* is condemned on the ground that receiving something in exchange for nothing is immoral.<sup>4</sup> Profit earned from speculative transactions is condemned as *riba*. Gambling obviously falls into this category, but the concept that risk (*gharar*) is wrong is extended to prohibit any transaction in which the gain of each party is not clearly defined at the time the contract is made.<sup>5</sup>

By Shari'a standards, many modern commercial transactions contain elements of *riba* or *gharar*. To avoid *riba*, a seller must do something to add value before he resells the product. For example, a lessee could not sublease property for more than he is paying the owner because the profit would be unearned.<sup>6</sup> Likewise, a seller must at least take possession of property before he resells it, otherwise he could not have added any value.<sup>7</sup> Any contract that left the payment term open (either the amount or the date due)<sup>8</sup> or tied it to some standard that fluctuates, such as the market price or the prime rate of interest, would be void because it involved *gharar*. For example, if the price term was simply stated as the prevailing market price of a commodity at a point in the future, the parties would be gambling; a large swing in price one way or the other would produce a windfall for one party. Any contract in which an obligation is conditional on the occurrence of an event that might not occur (such as an insurance contract) would also involve risk or *gharar*, and hence be void.<sup>9</sup> An extreme example is that a construction contract that specifies both the job to be done and a completion date could be void because of the risk that unforeseen circumstances might arise that would prevent the contractor from fulfilling the contract.<sup>10</sup>

The indisputably enforceable (and most preferred) form of contract in Shari'a is a sale of goods with the unconditional and immediate transfer of ownership of an existing object in exchange for a fixed price. This transaction eliminates any risk that one party might make an unforeseen profit out of the transaction. For such a sale to be valid, transfer of ownership must pass immediately upon conclusion of the contract; if transfer of ownership is left to the future, an element of speculation is

4. *Id.* at 145; N. COULSON, *supra* note 1, at 11.

5. N. COULSON, *supra* note 1, at 11, 43-44.

6. J. SCHACT, *supra* note 3, at 145.

7. *Id.* at 147.

8. N. COULSON, *supra* note 1, at 20; A. DOI, SHARI'AH: THE ISLAMIC LAW 381 (1984); Hill & Abbas, *Comparative Survey of the Islamic Law and the Common Law Relating to the Sale of Goods*, 2 J. ISLAMIC & COMP. L. 88, 98 (1968).

9. N. COULSON, *supra* note 1, at 44. The sale of animals unborn or fish not yet caught or agricultural products not yet harvested are all forbidden. A. DOI, *supra* note 8, at 379-80.

10. N. COULSON, *supra* note 1, at 90.

introduced that would be unacceptable.<sup>11</sup> Contracts for the sale of goods to be manufactured are recognized, but are revocable by either party prior to completion of the manufacturing process.<sup>12</sup> Service or hire contracts must precisely define the type of services to be performed, the consideration (wages or rent), and the period of hire.<sup>13</sup>

Specific exceptions to these rules exist for some types of special transactions. For example, two parties can start a business in which one provides capital and the other labor with an agreement to divide the profits. This is called a "*mudaraba*,"<sup>14</sup> and is valid even though the compensation and amount of labor is uncertain.

The consequence of entering into a contract that is tainted by *riba* is that the courts will not enforce it. The courts will, however, use what the common law would call equitable remedies to restore the parties to the positions that they had before entering into the contract. One who received services would have to pay for the value received. A buyer who had the use of a house in a sales transaction that is void would pay the seller rent for the period of occupancy.<sup>15</sup>

### C. RESCISSION

In several instances Shari'a law allows the parties to rescind otherwise valid contracts. The right to rescind arises in the situation in which the seller has not performed. The buyer may rescind the contract if a defect exists in the goods that substantially impairs the value of the goods. In a service contract, the buyer can revoke if the quality of service is not adequate. In effect, Shari'a imposes what the common law would call a warranty of merchantability. Unlike the common law, this right to revoke cannot be waived or excluded by contract, and the seller has the burden of proving the absence of any defect.<sup>16</sup>

In contracts that involve an ongoing relationship, such as agency, partnership, license, or the supply of goods or services on a continuing basis, each party has a right to terminate the contract unilaterally at any time, even if the contract specifies a period of duration.<sup>17</sup> The courts may require the terminating party to make some equitable reparation for the other party's immediate losses, but they are unlikely to make him whole by Western standards. This is because Shari'a does not recognize the

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11. *Id.* at 19-21. An exception to this rule exists in the case of salam contracts, *see* text *infra* note 29.

12. N. COULSON, *supra* note 1, at 21.

13. *Id.* at 22.

14. *Id.* at 23.

15. *Id.* at 52-53.

16. *Id.* at 66.

17. *Id.* at 76-77.

concept of consequential damages. Calculation of damages by Shari'a courts never takes into account anticipated profits because that is an uncertain matter.<sup>18</sup>

Another basis for revoking a contract is one that corresponds roughly to *force majeure*, although in Shari'a the concept is broader than in Western law. This ground for termination differs from unilateral termination in that an external cause justifies the termination. Basically, any unforeseen condition allows termination. Any change in circumstance justifies rescission because to do otherwise would constitute unfair loss or damage (*darar*) to the affected party. A lessor can terminate a lease because his financial conditions have changed and he needs to sell the house. A lessee can terminate the lease because he wishes to travel or has changed his job. A contractor who is hired to dig a well but who strikes rock after ten feet would be entitled to cease performance.<sup>19</sup>

Shari'a is very vague as to the remedies that are available if the contract is terminated due to an unforeseen condition. The contractor who stopped digging the well would probably get paid something for his effort. But the possible remedies in cases of termination for unforeseen circumstances are as numerous as the number of judges who might hear the case.

#### D. CONDITIONS IN THE CONTRACT

Terms and conditions in a contract defining the goods to be delivered, the services to be performed, or the method and amount of payment, are viewed by Shari'a proper and necessary. Conditions in a contract that are "contrary to the essence of the contract," however, are regarded as void under Shari'a. An example would be a condition in a sale of goods that would limit the buyer's freedom to use the goods, such as forbidding him to resell them to another person. Thus, conditions in a license of technology that impose territorial limitations or confidentiality obligations may not be enforceable.

A third category of conditions consists of terms that are regarded by Shari'a as unrelated to the essence of the contract. Whether these unrelated conditions will be enforced depends upon whether they are regarded as substantial or nonsubstantial. The following examples help to illustrate substantial and nonsubstantial conditions:

- Seller sells his camel to Buyer on condition that Seller is allowed to ride it back to his home.
- X rents his house to Y on condition that X lends him a sum of money.
- Buyer buys a piece of cloth on condition that Seller tailor it.

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18. *Id.* at 82.

19. *Id.* 85-86, 91.

The first example is regarded by Shari'a as a minor or nonsubstantial condition. The second and third examples are major conditions that Shari'a would treat as void unless separate prices are stated for each condition.<sup>20</sup> The rationale seems to be that if more than one independent transaction is involved, the parties should enter separate contracts; otherwise, uncertainty exists as to how to apportion the consideration between the two distinct deals.

### E. ISLAMIC FINANCING

The starting point for understanding the Islamic slant on financing is, of course, that any agreement to pay interest would be *riba* and therefore void. This position was most recently reaffirmed by the Islamic Fiqh (jurisprudence) Academy of the Islamic Conference at its conference in 1986.<sup>21</sup> Several mechanisms are available to obtain financing without violating Shari'a law.<sup>22</sup>

For project financing, the typical Islamic financing mechanism is based on the trading partnership of *mudaraba* in which one party contributes capital, the other party contributes labor, and they divide the profits. The most straightforward *mudaraba* arrangement involves a loan of money for general operating costs to a business in exchange for a percentage of the profits.<sup>23</sup> Shari'a also permits an arrangement that guarantees the lender repayment of his principal without interest (but with a small administrative fee) and a percentage of the profits of the borrower's enterprise.<sup>24</sup>

In the case of a loan to finance a single purchase, the procedure is more complicated. The transaction must be structured in two steps: first, the lender takes ownership of the goods from the seller for cash; second, the lender sells the goods to the buyer for an agreed price payable at a later date<sup>25</sup> or by installments.<sup>26</sup> The lender must take physical possession of the goods (at least by means of certificate of title or bill of lading) to avoid

20. *Id.* at 53-54. The relevant portions of the Sunnah are: "The Messenger of Allah has forbidden making one contract of sale into two transactions of sale" and "The Messenger of Allah has forbidden to attach an extra condition with a sale transaction." A. DOI, *supra* note 8, at 363.

21. MIDDLE E. EXECUTIVE REP., March 1986, at 7.

22. See generally Tussing, *Understanding Islamic Banking*, MIDDLE E. EXECUTIVE REP., Dec. 1986, at 17; Roy, *Islamic Banking: Rapid Growth and the Moral Dilemma*, MIDDLE E. EXECUTIVE REP., April 1986, at 8.

23. Khan & Mirakhor, *The Framework and Practice of Islamic Banking*, FIN. & DEV., Sept. 1986, at 32, 34.

24. See N. COULSON, *supra* note 1, at 94.

25. Carlson, *Trade Finance under Islamic Principles: A Case Study*, MIDDLE E. EXECUTIVE REP., Dec. 1986, at 9.

26. J. SCHACT, *supra* note 3, at 153.

tainting the transaction with *riba*.<sup>27</sup> Rather than a sale, a lender could also finance a purchase by means of a financing lease.<sup>28</sup>

Another financing mechanism recognized by Shari'a is the "*salam*" contract, in which a buyer pays for goods in advance of delivery. A lender who did not wish actually to buy the goods would need to line up another buyer to whom he could sell the goods immediately upon taking possession of them (or the bill of lading or certificate of title that represents the goods). Because of the potential for uncertainty in this situation, numerous rules exist to govern the *salam* contract.<sup>29</sup> For example, the goods must not be in existence or must be incapable of delivery at the time that the contract is made. The full price must be paid at the time the contract is made, although a three-day grace period is allowed if the parties so agree.<sup>30</sup> A *salam* contract is not valid if the buyer pays by setting off or forgiving an existing debt.<sup>31</sup>

Shari'a does not recognize the concept of holder in due course. Similarly, one who gives a guarantee is able to assert defenses of the person whose obligation is being guaranteed; the unconditional guarantee is not known to Shari'a.<sup>32</sup> These concepts do not offend any principle of Shari'a, but were simply unknown to the leading Shari'a scholars at the time that they wrote. Therefore, Islamic governments can supplement Shari'a by statutes that recognize these concepts.

Another limitation in Islamic financing is the difficulty of taking a security interest for a debt. Mortgages are not recognized in Shari'a, and a pledge of property to secure a debt is valid only if the creditor takes physical possession of the property.<sup>33</sup> This may make a financing lease the most attractive form of financing in an Islamic system.

## F. INSURANCE

After interest, the most well-known aspect of modern commerce that Shari'a rejects is insurance. This traditional view was reaffirmed in 1976 by Islamic scholars at the First International Conference on Islamic Economics and in 1986 by the Islamic Fiqh Academy.<sup>34</sup> The basis for rejecting insurance contracts is that they are *gharar* or too uncertain, and amount simply to gambling.<sup>35</sup>

27. *Id.* at 147.

28. Tussing, *supra* note 22; Roy, *supra* note 22.

29. J. SCHAFT, *supra* note 3, at 153.

30. N. COULSON, *supra* note 1, at 21; Hill & Abbas, *supra* note 8, at 97.

31. Hill & Abbas, *supra* note 8, at 97.

32. See N. COULSON, *supra* note 1, at 1-5.

33. J. SCHAFT, *supra* note 3, at 139-40.

34. Haberbeck, *Rising Sharing in an Islamic Society*, 2 ARAB L.Q. 138, 141 (1987); MIDDLE E. EXECUTIVE REP., March 1986, at 7.

35. N. COULSON, *supra* note 1, at 44; Haberbeck, *supra* note 34, at 140.

The 1986 conference, however, concluded that cooperative or mutual insurance is legal under Shari'a. This form of insurance company does not make profits, but rather shares earnings among its policy holders who are, in effect, also its owners. The logic appears to be that cooperative insurance cannot entail any unjustified profits (i.e., *riba*) for the insurance company as against the policy holder because the insurance company is the policy holder.

#### G. PERSONAL INJURY

Personal injury claims in Shari'a (for nonintentional, accidental loss) are compensated by reference to the "*diyah*," which is often translated as "blood money." The *diyah* is the amount payable by the family of the person causing the injury to the family of the injured or deceased person. The Prophet originally fixed the amount of *diyah* for the death of a man at 100 camels. This amount has long since been converted to specie. In Saudi Arabia, the *diyah* payable for the death of a Moslem male is now 120,000 Saudi Riyals (\$32,000). The *diyah* for the death of a Moslem female or a non-Moslem male is \$16,000, and the *diyah* for a non-Moslem female is \$8,000. These amounts are doubled if the death occurs in the last two months or the first month of the Islamic *hegiera* calendar.<sup>36</sup>

For injury that does not result in death, the *diyah* is a portion of the amount payable for death. For example, loss of an eye is valued at one half the amount payable for death. Thus, a Shari'a court in Saudi Arabia would not order a defendant to pay more than \$64,000 for a personal injury claim. The injured party and his family are entitled to only one *diyah*, even if several defendants may be liable.<sup>37</sup>

Suits against manufacturers are unusual. Shari'a does not have a products liability rule, but one who causes the death or injury of another will be required to pay *diyah* even if no negligence was involved.<sup>38</sup>

#### H. DISPUTE RESOLUTION

Shari'a has provisions for due process and equality under the law, regardless of religion or nationality, that would be familiar to Western lawyers. Three elements of legal procedure are sufficiently important and different from Western practice as to merit attention, however. The first and most noteworthy difference is the requirement that all witnesses be Moslems.<sup>39</sup> This belief in religious piety as a component of credibility is reminiscent of the old common law distrust of witnesses who were atheists.

36. A. LERRICK & Q. MIAN, SAUDI BUSINESS AND LABOR LAW 330-34 (1987).

37. See Ahmed v. The Boeing Co., 720 F.2d 224, 226 (1st Cir. 1983).

38. J. Saba, The Law of Saudi Arabia 22 (1984, private monograph).

39. S. SALEH, COMMERCIAL ARBITRATION IN THE MIDDLE EAST 36, 62 (1984); accord, A. LERRICK & Q. MIAN, *supra* note 36, at 213.



Second and especially significant in view of the first point is that oral testimony is valued much more strongly as proof than written documents. If oral testimony is opposed only by written evidence it is accepted as dispositive of the point at issue.<sup>40</sup> In financial matters, a party must produce two male witnesses or one male and two female witnesses in order to prove a point.<sup>41</sup>

The third point of divergence is that Shari'a recognizes the institution of arbitration, but places some significant limitations on it. Arbitrators must be Moslems who meet the qualification to be a Shari'a judge (a "*gadi*").<sup>42</sup> Arbitration clauses in contracts, whereby the parties agree that any future dispute related to the contract will be submitted to arbitration, are unenforceable. An agreement to arbitrate can be made only after a dispute arises because an arbitration clause would be *gharar*; that is, an uncertainty would exist because the nature or even the existence of a future dispute would be uncertain.<sup>43</sup> An additional limitation is that an agreement to arbitrate an existing dispute is revocable by either party up to the point that an award is made.<sup>44</sup> Finally, arbitration under Shari'a differs from the practice in most Western countries in that the losing party can have an award overturned in court for errors of law (though not for errors of fact).<sup>45</sup>

## II. The Application of Shari'a in Practice

### A. THE CONSTITUTIONAL STATUS OF SHARI'A

The country most influenced by Shari'a is Saudi Arabia, because it is the Islamic country least affected by European colonialism and because it is the heartland of Islam, containing as it does the two holy cities of Mecca and Medina. The Saudi Government has decreed that the Koran is the constitution of Saudi Arabia.<sup>46</sup> The Shari'a, being divinely revealed, is the only law in Saudi Arabia. The government has issued a number of commercial regulations or statutes, such as a companies regulation, but it is significant that these are referred to as regulations or statutes rather than laws. Shari'a recognizes the right of rulers to issue statutes that supplement Shari'a. Only Allah can make law, however, and the government's regulations will be effective only to the extent that they do not

40. S. SALEH, *supra* note 39, at 65-66.

41. *Id.* at 63.

42. *Id.* at 23.

43. *Id.* at 49-50.

44. *Id.* at 24, 43. The Maliki school of Shari'a law believes that the agreement to arbitrate an existing dispute is not revocable at all, and the Hanafi school believes that it is not revocable once the proceeding has begun. *Id.*

45. *Id.* at 25.

46. Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 16 INT'L LAW. 321, 322 n.5 (1982).

contradict Shari'a law. By analogy to the United States, regulations or statutes that contravene Shari'a would be "unconstitutional."<sup>47</sup>

In Saudi Arabia the courts of general jurisdiction are the Shari'a courts. Administrative courts exist to hear matters arising under regulations. For example, a labor court exists under the aegis of the Ministry of Labor to hear disputes between employers and employees; a body called the Legal Committee exists under the aegis of the Ministry of Commerce to hear disputes involving banks and their customers; and a special body called the Grievance Board exists to hear commercial disputes and disputes between the government and its contractors. These administrative courts function in parallel with the Shari'a courts. Even matters arising under the regulations, however, could be reviewed in Shari'a courts if those courts chose not to defer these matters to the administrative courts. The administrative courts are usually staffed at least in part by judges trained in Shari'a.<sup>48</sup>

A number of other Islamic countries have declared that Shari'a is the basis of their legal system.<sup>49</sup> Syria, Egypt, Kuwait, Bahrain, Qatar, and the United Arab Emirates all have written Constitutions that declare Shari'a to be either "the primary source" or "a primary source" of law in those countries.<sup>50</sup> Libya has proclaimed the Koran as its Constitution.<sup>51</sup> The Constitutions of Sudan<sup>52</sup> and Pakistan<sup>53</sup> require that their legal systems be based on Shari'a. Finally, Iran's revolution has also placed it among the group of countries proclaiming Shari'a to be the basic law of the land.<sup>54</sup>

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47. *Id.* at 325; Vogel, *Decision No. 822 on Banking Disputes: An Analysis*, MIDDLE E. EXECUTIVE REP., April 1986, at 9, 22.

48. Boshoff, *Saudi Arabia: Arbitration vs. Litigation*, 1 ARAB L.Q. 229 (1986). A Saudi lawyer has written that employees with claims under the Saudi labor law are not limited to submitting their claims to the labor court; they alternatively can go to the Shari'a courts "which have jurisdiction over all disputes." Mogharbel, *Shari'a Court Can Help*, SAUDI GAZETTE, Nov. 10, 1987 at 9; accord Vogel, *supra* note 47, at 22.

49. The legal system of Turkey has been totally secular and based on Western law since the time of Kemal Ataturk. The Islamic countries of South-East Asia (*e.g.*, Indonesia, Malaysia, Brunei) are excluded from this study because, to the extent that Shari'a is applied in these countries at all, it is limited to family law matters. M. HOOKER, *ISLAMIC LAW IN SOUTH-EAST ASIA* 151, 265 (1984).

50. S. SALEH, *supra* note 39, at 11.

51. *Id.* at 230.

52. Article 9 of the 1973 Constitution of Sudan provides that "Islamic law and custom shall be the main sources of legislation." Gordon, *The Islamic Legal Revolution: The Case of Sudan*, 19 INT'L LAW. 793, 802 (1985). The Civil Procedure Act of 1983 requires the courts to disregard any law contrary to Shari'a and to apply Shari'a wherever statutory law is silent. *Id.* at 801.

53. The 1963 Constitution of Pakistan forbids any law that conflicts with Shari'a. J. ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* 176 (1976).

54. Amin, *Iran*, in *LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST* 60 (D. Campbell ed. 1986).

Unlike in Saudi Arabia, however, the theoretical status of statutes that contravene Shari'a in these countries is not clear. The effect of these constitutional provisions may be more symbolic than substantive. When the Egyptian Constitution was amended to provide that Shari'a had to be the source of law there, the courts were thrown into a state of confusion. The Egyptian Court of Cassation took the extraordinary step of issuing a circular to the lower courts directing them to continue to enforce all existing statutes until legislation was enacted to implement this change in the Constitution.<sup>55</sup> Article 2 of the Pakistani Constitution of 1963, which states that laws must conform to Islam, has been held by Pakistani courts not to be a substantive part of the Constitution, so specific statutes have been required to conform the laws to Shari'a.<sup>56</sup> The Civil Codes in Egypt, Libya, Syria,<sup>57</sup> Bahrain,<sup>58</sup> and U.A.E.<sup>59</sup> provide that Shari'a is a general source of law in cases not provided for in the Code. This implies that the Civil Codes are to prevail in the event of a direct conflict with Shari'a.

#### B. LIMITATIONS ON FREEDOM OF CONTRACT

It is difficult to determine how seriously courts in modern-day Islamic countries invoke Shari'a principles such as *riba* and *gharar* to invalidate contracts. Because there is no accessible system of reporting court decisions in these countries, word of mouth and anecdotal reports are the chief guides available. Further complicating the assessment is that Shari'a does not rely upon precedent. Even if court decisions were reported systematically, they would be of limited value because the existing norm of interpretation could change at any time.

Egypt is the most influential Arab country in terms of its civil law. The Egyptian Civil Code has been copied in whole or in part by many Arab countries, particularly Libya, Syria, Iraq,<sup>60</sup> and Kuwait.<sup>61</sup> The Egyptian

55. W. BALLANTYNE, *COMMERCIAL LAW IN THE ARAB MIDDLE EAST: THE GULF STATES* 50 (1986).

56. R. PATEL, *ISLAMIZATION OF LAWS IN PAKISTAN?* 211 (1986).

57. Egyptian Law No. 131 of 1948, *reprinted in* 4 *COMMERCIAL LAWS OF THE MIDDLE EAST* (Oceana, Release 3, 1981) art. 1 [hereinafter *EGYPTIAN CIVIL CODE*]; *Note, The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts* 9 *COLUMBIA J. TRANSNAT'L L.* 384, 415 (1970).

58. W. BALLANTYNE, *supra* note 55, at 56-57.

59. The situation is confusing in the U.A.E. Federal statutory law apparently provides that any law contrary to Shari'a is void (Law No. 10 of 1973, art. 75, *cited in* W. BALLANTYNE, *supra* note 55, at 58) and a court in Abu Dhabi has, on this basis, declared a provision in the Abu Dhabi Civil Procedure Code void (W. BALLANTYNE, *supra* note 55, at 59). As noted below, however, the recently issued U.A.E. Civil Code modifies a number of Shari'a rules regarding contracts and provides that Shari'a is to be used to supplement the Civil Code, rather than to supersede it.

60. *Note, supra* note 57, at 420-21; J. ANDERSON, *supra* note 53, at 88.

61. Kassim, *The New Civil Code of Kuwait*, *MIDDLE E. EXECUTIVE REP.*, Feb. 1982, at 2, 3.

Civil Code is derived primarily from the Napoleonic Code.<sup>62</sup> The Egyptian Civil Code does, however, reflect the influence of Shari'a in that it provides that rescission should be allowed where "exceptional and unpredictable events of a general character" would make performance onerous for one party.<sup>63</sup> This is a narrow version of the Shari'a principle of rescission for unforeseen circumstances. Unlike traditional Shari'a, this provision would not allow a party to cancel a contract for a trivial reason such as a change in personal plans. Similar provisions are found in the Codes of Iraq, Libya, and Syria.<sup>64</sup> The Iraqi courts are interpreting this provision of the Civil Code in a much more limited way than a classical Shari'a court would and are restricting this right to rescind for unforeseen circumstances to very extreme situations.<sup>65</sup>

Other than this limitation, most Arab statutes do not restrict the ability of the parties to enter into a contract freely. For example, contracts that contain elements of uncertainty or risk are explicitly allowed by the Codes in Egypt,<sup>66</sup> Iraq,<sup>67</sup> Kuwait,<sup>68</sup> and Dubai.<sup>69</sup> The Contract Law in Bahrain was prepared by the British prior to independence and takes no account of Shari'a principles.<sup>70</sup> The new Civil Code of the U.A.E. is treated separately below.<sup>71</sup>

In Pakistan contracts are governed by laws promulgated by the British Raj, The Sales of Goods Act, 1930, and the Contract Act, 1872. Obviously, these laws are based on British common law<sup>72</sup> and are not influenced by Shari'a concepts. In 1980, the Zia government created the Federal Shari'a Court with the power to require changes in most laws so as to conform

62. J. ANDERSON, *supra* note 53, at 18, 88.

63. EGYPTIAN CIVIL CODE, *supra* note 57, art. 147.

64. See Note, *supra* note 57, at 420-21.

65. N. COULSON, *supra* note 1, at 91.

66. EGYPTIAN CIVIL CODE, *supra* note 57, arts. 131 ("things that may happen in the future may be the object of an obligation"), 265 (a conditional obligation that depends on an uncertain event in the future is generally valid).

67. J. ANDERSON, *supra* note 53, at 97.

68. The KUWAIT COMMERCIAL CODE, Decree Law No. 68 of 1980, *reprinted in* 2 BUSINESS LAWS OF KUWAIT (N. Karam ed. 1987), allows: the sale of property that does not yet exist (art. 130); the sale of goods even where a risk exists that they may perish before delivery (art. 121); and a contract lacking a price term if the intent is to use market price or a price fixed by a third party (arts. 124, 125). The KUWAIT CIVIL CODE, Decree Law No. 67 of 1980, *reprinted in* 3 BUSINESS LAWS OF KUWAIT, *supra*, allows contracts for the sale of something not yet in existence (art. 168).

69. Dubai, *Law of Contract 1981*, *reprinted in* BUSINESS LAWS OF THE UNITED ARAB EMIRATES (N. Karam ed. 1987), allows contracts that are conditional upon uncertain future events (arts. 36, 37). This law is probably superseded by the new U.A.E. Civil Code.

70. See, W. BALLANTYNE, *supra* note 55, at 81. See generally Bahrain, Contract Law Regulation 1961, *reprinted in* W. BALLANTYNE, *supra* note 55, at 279.

71. See *infra* text accompanying note 105.

72. A. CORNELIUS, LAW AND JUDICIARY IN PAKISTAN 379 (1981); M. MANNAN, THE SALE OF GOODS ACT 2 (5th ed. 1980).

them to Shari'a.<sup>73</sup> This court has ordered that the following proviso be added to the Contract Act and Sales of Goods Act: "that contract shall be declared void which is forbidden by the Holy Koran and Sunnah of the Holy Prophet."<sup>74</sup> This provision creates uncertainty as to which contracts Pakistani courts will enforce in the future. Such a general statement may not be sufficient to cause the courts to abandon common law principles of contract to which they have become accustomed over the years. Or, this proviso, combined with pressure from government and Islamic sources, may result in a substantive change in the law. If this were to happen, it is noteworthy that the proviso is limited to the two most primary sources of Shari'a, the Koran and the Sunnah, and pointedly excludes the secondary sources of Shari'a, the writings of the early scholars. This appears to require the Pakistani courts to interpret anew the Koran and Sunnah, thus perhaps reopening the door of *ijtihad*. One can only hope that in this process, the practical experience of modern commercial transactions would cause the Pakistani courts to reach results that differ from those of the early Shari'a scholars and thereby give businessmen more freedom of contract.

Sudan under the regime of Ga'afar Nimeiri began in 1983 to issue a series of new laws, all of which were ostensibly based on Shari'a.<sup>75</sup> These laws imposed Islamic criminal law and family law, but appear to have affected commerce only to the extent of prohibiting interest. The Nimeiri laws are viewed by some legal authorities as unrelated to, and even partially in conflict with, Shari'a.<sup>76</sup> The Sudanese Civil Transactions Act, for example, is based on the Jordanian Civil Code (derived in turn from Egypt and Europe) rather than Shari'a law.<sup>77</sup> The effect of these laws is unclear because the new government that replaced Nimeiri in 1985 is torn between further Islamization of the law and a return to a secular legal system as demanded by the rebellious southern provinces.<sup>78</sup>

Saudi Arabia does not have a civil or commercial code and is unlikely ever to adopt one, because such a code would at least implicitly derogate from Shari'a as the chief legal authority. In Saudi Arabia, Shari'a defenses to enforcement of contracts (other than in cases involving interest on loans) do not seem to be raised. No cases are known to the author in

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73. R. PATEL, *supra* note 56, at 88, 89.

74. *Id.* at 168.

75. Gordon, *supra* note 52, at 798.

76. Mayer, *Khartoum: After the Fall*, MIDDLE E. EXECUTIVE REP., Oct. 1985, at 8, 22.

77. *Id.*

78. Reuters, *Sudan Party Wants Reimposition of Shari'a by New Gov't*, SAUDI GAZETTE, Aug. 31, 1987, at 1. In December 1987, the Sudanese Government announced that it was "relaxing its Shari'a law," including authorizing interest. Reuters, *Sudan Eases Shari'a Law*, SAUDI GAZETTE, Dec. 12, 1987, at 2.

which the defendant raised the defense, for example, that the contract in question was void on the ground that it involved uncertainty or speculation about a future event. Because Shari'a law will always control in Saudi Arabia, even when government regulations are to the contrary, this may change. It may be that these sorts of defenses have not been raised in the past because, in the boom times, litigation was not frequent. The Shari'a defense to interest payments came to the attention of banks only two or three years ago. As litigation becomes more intense with the end of the oil boom, the full panoply of the Shari'a defenses to enforcement of contracts may yet be seen in Saudi Arabia.

### C. FINANCE AND INSURANCE

The area in which the effect of Shari'a is most apparent is interest, and the country in which the resultant conflict is most acute is Saudi Arabia. As the price of oil receded from the high of \$30 per barrel, a number of banks were left holding loan agreements for interest that were not enforceable in Saudi Arabia. The courts, both Shari'a and administrative, have regularly rejected all claims by lenders to recover any amount beyond the principal of the loan.<sup>79</sup> Pakistan and Iran have imposed bans on interest on their banking systems and required their banks to convert completely to Islamic financing.<sup>80</sup> Sudanese courts are not empowered to enforce contractual provisions involving interest.<sup>81</sup>

Most Islamic countries, however, have not followed Shari'a in their attitude toward interest and banking. The Egyptian Civil Code recognizes contracts that involved interest.<sup>82</sup> These provisions of the Civil Code have been affirmed as constitutional by the Egyptian courts.<sup>83</sup> Iraq,<sup>84</sup> Qatar,<sup>85</sup> Kuwait,<sup>86</sup> Oman, and Bahrain<sup>87</sup> also legalize interest payments on loans. Even Saudi Arabia has not tried to force its banks to convert to Islamic financing. These banks still pay interest to customers on their accounts.

79. MIDDLE E. EXECUTIVE REP., Jan. 1986, at 5.

80. Khan & Mirakhor, *supra* note 23, at 35; Roy, *supra* note 22, at 19-20. Pakistani statutes permitting the courts to enforce contracts involving interest and to include pre-judgment interest when calculating damages are, for the moment, still effective. The Federal Shari'a Court will not obtain jurisdiction over these "fiscal" laws until 1990, at which time they probably will cease to be in force. R. PATEL, *supra* note 56, at 88-89, 96, 160.

81. Gordon, *supra* note 52, at 812. *But see supra* note 78.

82. EGYPTIAN CIVIL CODE, *supra* note 57, arts. 226, 227, 542.

83. ARAB LAW NEWSLETTER, June 1986, at 1-2.

84. J. ANDERSON, *supra* note 53, at 97.

85. W. BALLANTYNE, LEGAL DEVELOPMENT IN ARABIA 114-15 (1980).

86. KUWAIT COMMERCIAL CODE, *supra* note 68, arts. 110, 409.

87. Oman, Qatar, and Bahrain all allow interest claims to be enforced. W. BALLANTYNE, *supra* note 55, at 133.

One member of the royal family has observed that "all the presently operating banks in Saudi Arabia are 'unconstitutional'."<sup>88</sup>

The laws of Islamic countries present problems in terms of secured transactions. It can be argued that Shari'a does not prohibit the creation of nonpossessory security interests in movable property; it simply did not contemplate such a development because of the difficulty of creating a registration system in a generally nonliterate world. However, few Islamic countries have developed such a system to date. Saudi Arabia recognizes mortgages of real estate, but provides for nonpossessory security interests in movable property only in the case of ships.<sup>89</sup> The Egyptian Civil Code also recognizes nonpossessory security interests only over real estate.<sup>90</sup> Egyptian law follows the Shari'a by requiring a creditor to take physical possession (called a "pledge") of any item of personal property over which he expects to have a meaningful security interest.<sup>91</sup> A nonpossessory security interest that is analogous to a lien is created by the Egyptian Civil Code in certain cases; most notably the seller is given a lien on any movable property to secure payment of the price.<sup>92</sup> These statutory liens, however, cannot be asserted against buyers in good faith.<sup>93</sup>

The recently issued Civil Code of the United Arab Emirates<sup>94</sup> goes beyond the Egyptian Civil Code slightly in that it allows nonpossessory security interests in both real estate and any movable property the ownership of which is registered with the government (such as automobiles).<sup>95</sup> As is the case in Egypt, creditors otherwise must take physical possession of the property in order to perfect their security interest.<sup>96</sup> The same general group of statutory liens recognized in Egypt are incorporated into the U.A.E. Civil Code, such as that of the seller in movable property to recover the price.<sup>97</sup> Again, the value of the seller's nonpossessory lien is limited because it can be defeated by a buyer in good faith.<sup>98</sup>

One departure from Shari'a law made by most Islamic countries is with respect to holders in due course of negotiable instruments. As with mort-

88. Tussing, *supra* note 22, at 17.

89. McNair, *Ship Mortgages: A Question of Security*, MIDDLE E. EXECUTIVE REP., March 1985, at 9.

90. Compare art. 1030 with art. 1096, EGYPTIAN CIVIL CODE, *supra* note 57.

91. *Id.* art. 1117.

92. *Id.* art. 1145.

93. *Id.* art. 1133.

94. Law of Civil Transactions of the State of the United Arab Emirates [hereinafter U.A.E. CIVIL CODE], issued Dec. 1985 and effective March 1986. The translation by James Whelan published in 3 BUSINESS LAWS OF THE UNITED ARAB EMIRATES (Supp. 2, 1987) [hereinafter J. WHELAN] is relied upon in this article.

95. *Id.* arts. 1399, 1400, 1411.

96. *Id.* art. 1453.

97. *Id.* art. 1524.

98. *Id.*

gages, Shari'a is not intrinsically hostile to this concept and can therefore be supplemented by statute in this regard. The concept of holder in due course on a negotiable instrument is recognized in Saudi Arabia<sup>99</sup> and most other Islamic countries.<sup>100</sup>

Most Islamic countries recognize the legality of for-profit insurance companies and regulate them by statute.<sup>101</sup> Saudi Arabia, however, has been ambivalent on the subject. Saudi Arabia does not permit profit-making insurance companies to be registered so as to be able to conduct business legally, yet it tolerates the operation of numerous insurance companies within its borders.<sup>102</sup> The Saudi Government even provides a dispute resolution mechanism for claims between these insurance companies and their policyholders.<sup>103</sup> The Government of Saudi Arabia has responded to the need to comply with Islamic law in the area of insurance by sponsoring the establishment of the National Company for Cooperative Insurance.<sup>104</sup> Despite its name, however, this company is owned by the government rather than by the policyholders.

#### D. CIVIL CODE OF THE UNITED ARAB EMIRATES

The United Arab Emirates recently promulgated a Civil Code. This Code is a significant departure from the Civil Codes in other Arab states such as Egypt, in that it is much more strongly influenced by the Shari'a. This difference as well as its recent issuance merits a detailed treatment.

The U.A.E. Civil Code begins by providing that if the Code does not cover a matter, then Shari'a law is to be followed. Further, Shari'a principles are to be used in interpreting the provisions of the Code.<sup>105</sup> This directive in itself is rather sweeping, as the commercial practice in the U.A.E. has been premised on the belief that Shari'a law was not applicable. As one author noted before the Civil Code was issued, "the impact of Shari'a on commercial contracts, which are mainly drafted by Western

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99. Negotiable Instruments Regulation, Royal Decree 37 (11-10-1383 H) art. 17, *reprinted in* 2 BUSINESS LAWS OF SAUDI ARABIA (N. Karam ed. 1987).

100. *E.g.*, IRAQ LAW OF COMMERCE No. 30, arts. 57, and 59 (1984) *reprinted in* 1 BUSINESS LAWS OF IRAQ (N. Karam ed. 1987); KUWAIT COMMERCIAL CODE, *supra* note 68, art. 429.

101. *E.g.*, EGYPTIAN CIVIL CODE, *supra* note 57, art. 747; KUWAIT CIVIL CODE 1980, *supra* note 68, art. 773; J. ANDERSON, *supra* note 55, at 96-97 (Iraq); U.A.E. CIVIL CODE, *supra* note 94, art. 1026; Oman, Royal Decree 12/79 OGSO no. 67, April 1, 1979, *cited in* Hill, *The Commercial Legal System of the Sultanate of Oman*, 17 INT'L LAW. 507, 527 (1983).

102. Haberbeck, *supra* note 34, at 142.

103. *Id.* at 144-46.

104. MIDDLE E. EXECUTIVE REP., March 1985, at 6; Haberbeck, *supra* note 34, at 143.

105. U.A.E. CIVIL CODE, *supra* note 94, arts. 1, 2.



lawyers, appears to be minimal."<sup>106</sup> The references in the Code to Shari'a must be interpreted as meaning that, when in doubt as to a matter, the restrictive Shari'a rule governs.

The U.A.E. Civil Code appears to be more concerned about avoiding contracts involving *gharar* than are other Arab Civil Codes. A specific chapter of the Civil Code is devoted to contracts involving *gharar*, although it is not clear whether this provision is intended to apply to commercial transactions. The gist of the chapter on *gharar* is that contracts involving "gambling" are void;<sup>107</sup> the term "gambling" is not defined, so whether anything other than wagers on sporting events or the like are intended to be prohibited is uncertain. The fact that the chapter on *gharar* is used to legalize insurance contracts<sup>108</sup> and annuities<sup>109</sup> implies by omission that all other contracts involving *gharar* not explicitly recognized by the Code would be invalid. Contracts involving an uncertainty due to being conditional on a future event are recognized as valid,<sup>110</sup> though this provision is not contained in the chapter on *gharar* contracts where logically one would expect to find it.

With respect to the existence or description of the subject matter of the contract, the Code appears to liberalize the traditional Shari'a rule as to certainty. Agreements to agree in the future are valid so long as the period within which the contract is to be negotiated is specified.<sup>111</sup> The property or subject matter of the contract need only be described sufficiently to avoid "gross" uncertainty.<sup>112</sup> Even this limitation can be circumvented if the buyer recites in the contract that he is "sufficiently aware of the property sold."<sup>113</sup> This language appears to be destined to become standard boilerplate in all U.A.E. contracts. The Code appears to liberalize (but does not abandon) Shari'a by recognizing contracts for the sale of things not yet in existence so long as there is the "absence of uncertainty."<sup>114</sup> The Code also goes beyond Shari'a by permitting a seller

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106. S. SALEH, *supra* note 39, at 344. Professor Coulson, however, reports cases antedating the Civil Code in which courts in the U.A.E. used Shari'a principles to invalidate commercial transactions that would be permitted under Western law. N. COULSON, *supra* note 1, at 1-5; *see also* note 59 *supra* and note 121 *infra*.

107. U.A.E. CIVIL CODE, *supra* note 94, art. 1021.

108. *Id.* art. 1026.

109. *Id.* art. 1022.

110. *Id.* art. 420.

111. *Id.* art. 146.

112. *Id.* arts. 203, 490.

113. *Id.* art. 491.

114. "A future thing may properly be the subject matter of commutative contracts involving property, in the absence of uncertainty." *Id.* art. 202.

to sell goods of which he has not yet taken delivery or possession<sup>115</sup> and to set the price of the goods by reference to future market price.<sup>116</sup>

The Code follows Shari'a most notably in that it prohibits interest on loans.<sup>117</sup> Despite the Code's prohibition on interest, however, officials of the U.A.E. Federal Government have issued statements that interest claims will be enforced<sup>118</sup> and the Emirate of Abu Dhabi (the most important state of the U.A.E.) has issued legislation since the enactment of the Federal Civil Code that expressly authorizes the courts in Abu Dhabi to enforce claims for interest.<sup>119</sup> Practitioners in the U.A.E. believe that interest will be legalized by the Federal U.A.E. Government despite the Civil Code. They point to the amendment of article 1 of the Civil Code shortly after the Civil Code was issued to provide that "commercial transactions shall continue to be governed by the laws and regulations then in force until the Federal Commercial Code is enacted." The optimistic interpretation of this amendment is that the Commercial Code will legalize bank loans involving interest because they will be deemed to be commercial rather than civil transactions and hence outside the scope of the Civil Code.<sup>120</sup> A court in Abu Dhabi has accepted this view.<sup>121</sup>

In view of its prohibition of interest, it is not surprising that the Civil Code recognizes the financing devices of the *salam* contract (called the "contract for forward sale")<sup>122</sup> and the *mudaraba* partnership.<sup>123</sup>

115. *Id.* arts. 584, 585.

116. *Id.* art. 504.

117. Article 714 provides that "if a contract of loan stipulates a benefit in excess of the essence of the contract, *otherwise than a guarantee of the right of the lender*, that stipulation is void but the contract is valid" (emphasis added). The meaning of this language is unclear. Article 710 indicates that the intent is that interest is prohibited. Article 710 defines a loan as a contract by which the borrower undertakes to return the borrowed property in like amount, kind, and description. This conclusion is also supported by other clauses of the Code. Article 849 defines a loan as conferring ownership over property of another for a limited period without consideration. Sales are forbidden by article 584, in which the seller defers receipt of the sales price in exchange for an increase in the sales price; and article 575 prohibits the sale of money in exchange for deferred payment of money. When read in the light of the interstitial rule that Shari'a applies except where the Civil Code specifies otherwise, these rules make the conclusion appear inescapable that the Code forbids interest.

118. CHADBOURNE & PARKE MONTHLY NEWSLETTER, Oct. 15, 1986, at 1.

119. MIDDLE E. EXECUTIVE REP., Sept. 1987, at 4; CHADBOURNE & PARKE MONTHLY NEWSLETTER, Aug. 15, 1987, at 1.

120. J. WHELAN, *supra* note 94, *Foreword*, at 3.1-i; CHADBOURNE & PARKE MONTHLY NEWSLETTER, March 15, 1987, at 1-2. This, in fact, is what happened in Kuwait. The KUWAIT CIVIL CODE, *supra* note 68, prohibits interest (art. 547); the KUWAIT COMMERCIAL CODE, *supra* note 68, allows interest in commercial transactions (arts. 110, 140).

121. ARAB LAW NEWSLETTER, June 1986, at 1. This decision appears to be contrary to a 1979 decision from a court in Abu Dhabi that declared void a provision in the ABU DHABI CIVIL PROCEDURE CODE allowing a court to award prejudgment interest as an element of damages. This decision was based on Federal Law No. 10 of 1973, which declared all laws void that contradict Shari'a; the court held that interest was contrary to Shari'a. W. BALANTYNE, *supra* note 55, at 59.

122. U.A.E. CIVIL CODE, *supra* note 94, art. 568.

123. *Id.* art. 691.

## E. DAMAGES

Part one of this article described two aspects in which Shari'a and Western law differ as to calculation of damages—consequential damages are not allowed, and personal injury claims are limited by the *diyah*. As noted above,<sup>124</sup> Saudi Arabia adheres to Shari'a in the area of calculation of damages for personal injury. The Civil Codes enacted by most Islamic countries do not follow Shari'a rules strictly in regard to damages. For example, Egyptian law directs the judge to award damages to cover all losses, including lost profits. The only exception is that, in the case of a contractual debt, damages not foreseeable at the time the contract was signed cannot be recovered unless the defendant was guilty of fraud or gross negligence.<sup>125</sup> Bahrain allows the plaintiff to collect damages for breach of contract except for those damages that are "indirect and remote."<sup>126</sup> Whether this exception would preclude claims for lost profits is not clear. Bahrain also allows personal injury claims without limitation by *diyah*.<sup>127</sup> Kuwait follows Shari'a in personal injury cases. The *diyah* is fixed at 10,000 Kuwaiti dinars<sup>128</sup> (approximately \$40,000 at the present exchange rate). Claims for property damage and breach of contract, however, can include indirect losses such as future profit.<sup>129</sup>

The U.A.E. Civil Code modifies Shari'a with respect to personal injury claims. A defendant who injures the plaintiff is liable for the full amount of the damages.<sup>130</sup> Consequential damages may be recovered as well as direct damages, but only if the harm was inflicted in a "wrongful or deliberate" manner.<sup>131</sup> The *diyah* is not payable on top of the damages awarded under the Civil Code,<sup>132</sup> but is subsumed within those damages.

## F. ARBITRATION

For the most part, Islamic governments have adopted arbitration statutes that resemble similar laws in the West and disregard the limitations

124. See *supra* text accompanying note 36.

125. EGYPTIAN CIVIL CODE, *supra* note 57, art. 221. Attributing this provision to Shari'a would be speculative; however, a similar provision is found in the CIVIL CODE (Fr.) § 1150.

126. BAHRAIN CONTRACT LAW REGULATION, *supra* note 70, art. 92.

127. BAHRAIN CIVIL WRONGS ORDINANCE 1971, art. 60, reprinted in W. BALLANTYNE, *supra* note 55, at 313. This law takes note of a plaintiff's right to seek *diyah*, but also requires such claims to be submitted to Shari'a courts (art. 71). By prohibiting a plaintiff from recovering twice for damages from the same defendant (art. 63), the Civil Wrongs Ordinance apparently requires the plaintiff to elect between *diyah* and a claim under the Ordinance.

128. KUWAIT CIVIL CODE, *supra* note 68, art. 251.

129. *Id.* arts. 227, 230.

130. U.A.E. CIVIL CODE, *supra* note 94, art. 282.

131. *Id.* art. 283.

132. *Id.* art. 299.

of Shari'a. For example, these statutes permit non-Moslems to be arbitrators (and, a fortiori, witnesses), recognize and enforce arbitration clauses in contracts, and do not allow courts to overturn arbitration awards for errors of law.<sup>133</sup> If no arbitration statute exists in a particular country, however, the result may be that the restrictions of Shari'a may be applicable. Thus, in Qatar, the U.A.E., and Oman, which do not have statutes on this subject, the status of commercial arbitration is quite uncertain and should be assumed to be governed by Shari'a.<sup>134</sup>

Saudi Arabia has adopted arbitration regulations that are distinctive in that they appear to follow Shari'a in many respects. The arbitrator must be a Moslem,<sup>135</sup> Shari'a law must govern the proceedings,<sup>136</sup> and courts appear to be empowered to overturn awards for errors of law.<sup>137</sup> Nevertheless, the statute does specify that arbitration clauses are enforceable.<sup>138</sup> Additionally, lawyers practicing in Riyadh report that non-Moslems testify regularly without any objection being raised.

No statutory impediment exists to the testimony of non-Moslems in legal proceedings in most Islamic countries. An exception to this rule may develop in Pakistan. In the course of revising its laws to conform to Shari'a, a draft law on evidence was prepared that would have codified explicitly the Shari'a requirement that proof of any proposition requires the testimony of two male Moslems or one male and two female Moslems. Women's groups protested this discrimination, with the result the Evidence Act of 1984 as finally promulgated fudges the issue by saying that "all persons are competent to testify," yet adding a proviso that witness competency is left to the discretion of the court applying Islamic principles.<sup>139</sup>

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133. Countries whose arbitration laws contain such provisions include Syria, Lebanon, Jordan, Iraq, Egypt, Kuwait, Libya, and Bahrain. See S. SALEH, *supra* note 39 *passim*. Additionally, Pakistan has an arbitration law that contains these Western-oriented provisions. T. SIMMONDS, B. HILL & S. JARVIN, *COMMERCIAL ARBITRATION LAW IN ASIA AND THE PACIFIC* 151 (1987).

134. See T. SIMMONDS, B. HILL & S. JARVIN, *supra* note 133, at 328, 342, 346, 370.

135. Rules for the Implementation of Royal Decree M-46, Council of Ministers Resolution No. 7/2021/M, art. 3 [hereinafter cited as Implementation Rules], *reprinted in* 3 *BUSINESS LAWS OF SAUDI ARABIA* (N. Karam ed. 1987).

136. *Id.* art. 39.

137. Royal Decree M/46, art. 20 (*reprinted in* 3 *BUSINESS LAWS OF SAUDI ARABIA*, *supra* note 135) provides that an award will be enforced so long as "there are no lawful impediments to its enforcement." Although this language is unclear as to whether courts should examine the award for errors of law, it is difficult to imagine an arbitration award allowing, for example, interest to be enforced.

138. Implementation Rules, *supra* note 135 art. 6.

139. R. PATEL, *supra* note 56, at 78-80.

## G. PROSPECTS OF MODERNIZATION

With a few prominent exceptions (most notably Saudi Arabia and now, with its new Civil Code, the U.A.E.), the tension between Shari'a and the commercial world has chiefly been resolved by ignoring Shari'a whenever it would create practical difficulties to do otherwise. Shari'a law is primarily used in the area of marriage, divorce, inheritance, and to a somewhat lesser extent, criminal and personal injury law. This attitude is not new. "It is the personal and family law that, together with rules of ritual and religious observance, has always been regarded as the very heart of Islam. The public law, on the other hand, . . . has been much less meticulously observed down the centuries."<sup>140</sup>

Because of the esteem in which Shari'a is held and because of its inelasticity, the tendency has been not to follow it rather than try to change it to fit new circumstances. The attitude has been that "it was better to keep it [Shari'a] in its pristine purity, as the external law which challenged the consciences of all Muslims, even if this meant putting it (as it were) under a glass case, for reverent contemplation rather than practical application."<sup>141</sup> A middle road is possible, however, and it offers the possibility for reconciliation of the economic development of the region with its cultural heritage. In June 1983, King Fahad of Saudi Arabia addressed the Islamic Fiqh Academy in Mecca. He called for the door of *ijtihad* to be reopened so that fresh thinking could be used to reconcile Shari'a with the modern commercial world. He proposed an international conference of Islamic legal scholars to modernize Shari'a, calling such a development "an imperative necessity."<sup>142</sup>

In the five years since King Fahad's dramatic appeal, no such conference has materialized. A substantial number of Shari'a scholars agree with the views of King Fahad,<sup>143</sup> however, so the possibility of modern-

140. Anderson, *Conceptions of Law: Islamic and Western*, in *COMPARATIVE LAW OF ISRAEL AND THE MIDDLE EAST* 15 (N. Kittrie ed. 1971).

141. J. ANDERSON, *supra* note 53, at 35-36.

142. Washington Post, June 16, 1983, at A1.

143. The Dean of the Shari'a Law Faculty at Qatar University recently called for reopening the process of *ijtihad*. CHADBOURNE & PARKE MONTHLY NEWSLETTER, Dec. 15, 1986, at 1. Two lecturers at the College of Shari'a in Mecca have excoriated jurists who "artificially . . . declared that the 'door of *ijtihad*', i.e. independent reasoning, should be closed . . ." and have declared that the "door of *ijtihad* is still open" in Saudi Arabia. Ali & Sulaiman, *Recent Judicial Developments in Saudi Arabia*, 3 J. ISLAMIC & COMP. L. 11, 11-12 (1969). While he was Saudi Minister of Petroleum, Sheikh Yamani (a lawyer by training) delivered a speech advocating the interpretation of Shari'a so as to allow new solutions to be developed for problems not previously encountered by Shari'a scholars. Yamani, *The Eternal Shari'a*, 12 N.Y.U. INT'L L. & POL. 205, (1979). A list of prominent Shari'a scholars who advocate re-opening *ijtihad* is provided by Noor Mohammad, a Professor at the University of Baltimore who has been a Visiting Professor at King Abdulaziz University in Mecca. Mohammad, *Introduction to Islamic Law*, in 5 MODERN LEGAL SYSTEMS CYCLOPEDIA 680, 688 (3d ed. K. Redden ed. 1985).

ization of Shari'a cannot be discounted. Professor Coulson, perhaps optimistically, has perceived the early stages in Islamic jurisprudence of "the abandonment of the medieval Shari'a authorities and the fresh interpretation of the basic texts of the Koran and the Sunnah in the light of the prevailing social climate."<sup>144</sup>

The enactment of the new U.A.E. Civil Code appears to represent a major milestone on the road to reconciling Shari'a with the modern commercial world. The U.A.E. Civil Code seems to be an effort to apply Shari'a law tempered by a sense of commercial reality. Pending its interpretation by the courts and the issuance of the Federal Commercial Code, this conclusion can only be tentative.

### III. Conclusion

The legal systems of some Islamic countries are in a state of transition. These countries are grappling with the problem of balancing reliance on concepts from European law with adherence to Shari'a law. Different approaches are being tried in different countries, but the final solution to this problem has not been reached in any of these countries.

At the present time, courts in most Islamic countries are likely to resolve most commercial disputes coming before them by analyzing the contract without regard to the restrictions of Shari'a. The list of states for which this conclusion cannot be safely drawn, however, is growing. This list includes at the moment most countries of the Arabian Peninsula (excluding Kuwait) as well as Iran, Pakistan, and Sudan. In view of the existence of Shari'a as the constitutional and cultural bedrock of many Islamic countries and the increasing popularity of the ideal of strict adherence to Islamic law, a business transaction with a party located in an Islamic country should be structured with the possibility in mind that Shari'a law may be applicable, if not at present then perhaps as a result of future changes in the political or legal climate. The recent enactment of the U.A.E. Civil Code demonstrates how matters can change suddenly. If Shari'a were applicable in some form, the possibility exists that at least some contracts, or provisions therein, typically used in international business transactions would not be enforceable. Even if the contract specifies that the applicable law is that of the United States, Shari'a law may be a concern if the other party is a resident of a country that has not signed the 1958 New York Convention on the Recognition and Enforcement of

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144. N. COULSON, *supra* note 1, at 105.

Foreign Arbitral Awards (the New York Convention).<sup>145</sup> Saudi Arabia, for example, has not ratified the New York Convention and will not enforce any foreign judgments or arbitral awards.<sup>146</sup> As a result, a judgment or arbitration award won in the United States or Europe against a Saudi party will be worthless unless the Saudi party has assets that can be seized in a country that has ratified the New York Convention.

In such a case, the most prudent and conservative course is for the Western party to assume that he will be unable to rely on the courts to enforce the contract. He instead will have to structure the deal in such a way as to have sufficient commercial leverage over the non-Western party either to compel the non-Western party to honor the contract or to have an adequate self-help remedy in case the non-Western party does breach the contract.

This leverage can be achieved in several ways. The buyer could be required to post a letter of credit or a large down payment upon signing a purchase contract. Payment should be in hand before goods are delivered. In a contract involving the provision of services, a short billing cycle coupled with the contractual right to cease performance if invoices become overdue would minimize exposure if advance payments are not possible.

The type of transaction in which commercial leverage would be most difficult to achieve is the license of technology. Once proprietary secrets are in the hands of the non-Western party, contractual restrictions on their use (such as restrictions on resale or territorial limitations) may not be enforceable through the legal system. One solution would be to license only to joint ventures in which the licensor has sufficient power either to veto actions by the licensee that would violate the license or to cause the licensee to be dissolved if it violates the license. Another solution would be to license the manufacture of only part of the product, so that the

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145. The following Islamic countries have ratified the New York Convention: Egypt, Indonesia, Jordan, Kuwait, Morocco, Syria, and Tunisia. Additionally, Oman has enforced an ICC award despite not having signed the New York Convention. Lane & Morton, *First Enforcement of an ICC Arbitration Award in Oman*, MIDDLE E. EXECUTIVE REP., Oct. 1985, at 9.

146. O'Sullivan, *Saudi Arabia Moves on Commercial Arbitration*, MIDDLE E. ECON. DIG., April 1985, at 26; Chandri & Clodfelter, *Commercial Arbitration in the Kingdom*, MIDDLE E. EXECUTIVE REP., July 1985, at 9. Saudi Arabia is a party to the "Agreement on Reciprocal Enforcement of Judgments among the Members of the League of Arab States," and therefore would theoretically enforce a judgment from a court in another member of the Arab League. A. LERRICK & Q. MIAN, *supra* note 36, at 168. Saudi Arabia is also a signatory to the International Center of the Settlement of Investment Disputes Treaty (ICSID), but has never agreed in negotiations with foreign investors to an ICSID arbitration clause.

licensee must buy kits in “black box” form from the licensor in order to assemble the final product. This approach would enable the licensor to enforce compliance with the license agreement by threatening to shut off the supply of kits.

Solutions can always be found to compensate for the deficiencies in all legal systems. The somewhat greater legal risks of doing business in the Islamic world are usually more than offset by the commercial benefits of such business.